ROZMI YUSOF

v.

PP

COURT OF APPEAL, PUTRAJAYA
MOHAMED APANDI ALI JCA
LINTON ALBERT JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: D-05-394-2010]
7 MAY 2013

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Conviction and sentence - Appeal against - Self defence - Whether trial judge considered issue of self defence - Whether evidence showed deceased armed with weapon - Whether appellant suffered injuries - Whether facts attracted right of private defence under s. 96 Penal Code - Failure to consider defence in correct perspective - Whether rendered decision perverse - Failure of trial judge to direct himself according to law - Whether amounts to misdirection - Whether safe to convict - Federal Constitution, art. 5(1)*

EVIDENCE: *Witness - Competency - Interested witness - Accused charged with murder - Whether witness participated in fight which caused death of deceased - Whether witness's evidence treated with caution - Failure by trial judge to follow directions in Magendran Mohan v. PP - Whether safe to convict - Federal Constitution, art. 5(1)*

The appellant was charged for the murder of the deceased under s. 302 of the Penal Code. At the end of the prosecution case, the trial judge found the prosecution had established a *prima facie* case against the appellant hence he was directed to enter his defence. The appellant submitted that it was self defence and the act of slashing the neck of the victim was an accidental act in response to the victim attacking him. The trial judge found that such defence failed to create a reasonable doubt and went against the weight of evidence as adduced by the prosecution. The trial judge thus convicted and sentenced the appellant to death. Dissatisfied, the appellant appealed. The appellant contended that the learned judge, *inter alia*, failed to consider (i) that the deceased had carried a weapon; (ii) that the appellant had suffered injuries; (iii) SP8, the victim's brother, who was an interested witness, had also participated in the fight between the appellant and the deceased; and (iv) the appellant had acted in self defence.

A **Held (acquitting and discharging appellant)**
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) There was evidence to show that the victim was armed with
B a curved dagger (Kerambit or also known as Lawi Ayam) when he went to the place where the incident occurred. SP8, the victim's brother, was with him. The trial judge failed to address his mind to the fact that the deceased had carried a weapon to the place of incident and that the appellant had
C also suffered injuries. The trial judge had also failed to consider the issue of self defence which would entitle the appellant to an acquittal. (paras 6 & 8)

(2) SP8 was an interested witness and had participated in the
D fight. His evidence ought to be treated with caution and was not done so in the instant case. The failure by the trial judge to follow the directions set out in the case of *Magendran Mohan v. PP* in respect of caution and corroboration made the decision perverse and not according to law. This would also
E attract art. 5(1) of the Federal Constitution to order an acquittal as the evidence to convict was based solely on SP8's evidence which was not safe and not in accordance to the law. (paras 10 & 11)

(3) As long as the force to defend was not disproportionate to the
F attack by the aggressor, the defence under s. 96 of the Penal Code would succeed and conviction could not stand. Whether such force to defend is disproportionate is one of finding of fact and the trial judge herein had failed to adumbrate this in the judgment. The fact that the deceased
G carried a dangerous weapon to the scene of the crime where subsequently a fight ensued, and that SP8 was also involved in the fight, had attracted s. 96 of the Penal Code. Failure to consider the defence in the right perspective would render the decision perverse and in breach of the said s. 96, which
H would attract the constitutional protection under art. 5(1) of the Federal Constitution, calling for the appellate court to intervene and set aside the conviction. (para 13)

(4) The failure of the trial judge to direct himself according to law
I amounted to misdirection resulting in miscarriage of justice, and attracted the jurisprudence 'not safe to convict' (*PP v.*

Thenegaran Murugan & Another Appeal; refd.) This court had no jurisdiction to deprive the life and liberty of the subject unless the decision was made according to law. Thus, the conviction and sentence by the High Court was set aside. (paras 11, 17 & 18)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh dengan pembunuhan si mati di bawah s. 302 Kanun Keseksaan. Pada akhir kes pendakwaan, hakim bicara mendapati bahawa pihak pendakwaan telah membuktikan satu kes *prima facie* terhadap perayu dan dengan itu, perayu diperintahkan untuk memasukkan pembelaan. Perayu, dalam pembelaannya, berhujah bahawa dia telah cuba mempertahankan diri dan tindakannya menetak leher mangsa adalah tindakan yang tidak disengajakan sebagai tindak balas kepada mangsa yang telah menyerangnya. Hakim perbicaraan mendapati bahawa pembelaan perayu gagal mewujudkan satu keraguan yang munasabah dan adalah bertentangan dengan keterangan yang telah dikemukakan oleh pihak pendakwaan. Hakim perbicaraan oleh itu telah mensabitkan dan menjatuhkan hukuman mati ke atas perayu. Tidak berpuas hati, perayu merayu. Perayu berhujah bahawa yang arif hakim, antara lain, telah gagal untuk mempertimbangkan (i) bahawa si mati telah membawa senjata yang bahaya; (ii) bahawa perayu telah mengalami kecederaan; (iii) SP8, adik lelaki kepada mangsa, yang merupakan saksi berkepentingan, telah terlibat dalam pergaduhan yang berlaku di antara perayu dan si mati; dan (iv) perayu telah bertindak dalam keadaan mempertahankan diri.

Diputuskan (melepaskan dan membebaskan perayu)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Terdapat keterangan yang menunjukkan bahawa mangsa bersenjatakan senjata melengkung (Kerambit atau juga dikenali sebagai Lawi Ayam) apabila mangsa pergi ke tempat kejadian. SP8, adik lelaki mangsa, telah berada bersamanya. Hakim perbicaraan telah gagal untuk menangani fikirannya kepada fakta bahawa si mati membawa senjata ke tempat kejadian dan perayu telah mengalami kecederaan. Hakim perbicaraan juga gagal mempertimbangkan isu mempertahankan diri yang akan memberi hak pembebasan kepada perayu.

(2) SP8 adalah saksi berkepentingan yang telah melibatkan diri dalam pergaduhan tersebut. Keterangannya harus dipertimbangkan dengan berhati-hati dan itu tidak berlaku dalam kes ini. Kegagalan hakim perbicaraan mengikuti arahan-arahan dalam kes *Magendran Mohan v. PP* berkenaan keperluan berhati-hati dan sokongan membuatkan keputusan yang dibuat adalah bertentangan dan tidak mengikut undang-undang. Ini akan menarik perkara 5(1) Perlembagaan Persekutuan untuk membuat perintah pembebasan kerana keterangan untuk mensabitkan adalah hanya berdasarkan kepada keterangan SP8 yang tidak selamat dan tidak menurut undang-undang.

(3) Selagi daya untuk mempertahankan diri seimbang dengan serangan oleh penyerang, pembelaan di bawah s. 96 Kanun Keseksaan boleh digunakan dan sabitan tidak boleh dikekalkan. Sama ada daya itu adalah seimbang merupakan satu dapatan fakta dan hakim perbicaraan di sini telah gagal menunjukkan perkara ini di dalam penghakiman. Fakta bahawa si mati telah membawa senjata berbahaya ke tempat kejadian di mana pergaduhan telah berlaku, dan SP8 juga telah terlibat di dalam pergaduhan itu, menarik s. 96 Kanun Keseksaan. Kegagalan mempertimbangkan pembelaan dari segi perspektif yang betul akan menyebabkan keputusan yang tidak betul dan melanggar s. 96 tersebut, yang akan menarik perlindungan perlembagaan di bawah perkara 5(1) Perlembagaan Persekutuan, dan seterusnya mewajarkan mahkamah rayuan campur tangan dan mengenepikan sabitan.

(4) Kegagalan hakim perbicaraan mengarahkan diri beliau mengikut undang-undang membawa kepada salah arahan yang mengakibatkan salah laksana keadilan yang berat, dan menarik perundangan 'tidak selamat untuk mensabitkan' (*PP v. Thenegaran Murugan & Another Appeal*; dirujuk). Mahkamah ini tidak mempunyai bidang kuasa untuk melucutkan kehidupan dan kebebasan seseorang melainkan jika keputusan tersebut adalah menurut undang-undang. Oleh itu, sabitan dan hukuman oleh Mahkamah Tinggi diketepikan.

Case(s) referred to:

Ahmad Mukamal Abdul Wahab, Suhana Kamarudin and Shawal Hashil v. PP, Cri A No. C-05-44-2011 (Unreported) ***(refd)***

Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(foll)***

Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***

PP v. Thenegaran Murugan & Another Appeal [2013] 4 CLJ 364 CA ***(refd)*** A
Rajinder v. State [1955] 5 SCC 187 ***(refd)***
Sochima Okoye v. PP [1995] 3 CLJ 371 CA ***(refd)***

Legislation referred to:
Federal Constitution, art. 5(1)
Penal Code, ss. 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, B
300, 302

For the appellant - Ahmad Nizam Mohamed (Alias Ibrahim with him); M/s Azahir Surainie & Azizan Ariff
For the respondent - Najib Zakaria; DPP C

[Appeal from High Court, Kota Bharu; Suit No: 45-14-2007].

Reported by Suhainah Wahiduddin

D

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's/accused appeal came up for hearing on 15 March 2013 and on the same day upon hearing both parties E we allowed the appeal. My learned brothers Mohamed Apandi bin Haji Ali, JCA and Linton Albert, JCA have read the judgment and approved the same. This is our judgment.

[2] The appellant was charged for murder. The charge reads as F follows:

> Bahawa kamu pada 31.8.2005, pada jam lebih kurang 9.00 malam bertempat di sebuah rumah tanpa nombor, di Kg Bonggol Kerian, dalam jajahan Pasir Puteh, di dalam Negeri Kelantan telah membunuh Rodzi bin Mohamad KPT 771216-03-5903 dan G dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[3] The learned trial judge at the end of defence case convicted and sentenced the appellant to death pursuant to s. 302 of the H Penal Code. Before us the appellant has filed a lengthy petition in essence to contend the learned judge *inter alia* failed to consider (i) the deceased carried a weapon; (ii) accused suffered injuries; (iii) SP8 was an interested witness; and (iv) self defence.

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[4] At the commencement of the hearing the learned counsel for the appellant requested an amendment to para. 14 of the petition of appeal to insert s. 96 of the Penal Code even though the said paragraph did mention the defence. The learned Deputy Public Prosecutor was magnanimous and did not object. We allowed the amendment. We must also say the learned Deputy Public Prosecutor had placed a comprehensive submission in an articulate manner.

[5] For the purpose of this appeal two paragraphs of the learned Deputy Public Prosecutor's submission will fairly represent the prosecution case as well as the appellant's defence. They are as follows:

> The Appellant claimed trial. When 7 witnesses gave evidence from the commencement of the trial, the case was heard by Justice Azman bin Husin while the continuation of the trial was handled by Justice Ahmad Zaidi bin Ibrahim with the consent of both the defence and the prosecution. At the end of prosecution case, the Learned Trial Judge found the prosecution had established a *prima facie* case against the Appellant hence he was directed to enter defence. The Appellant in his defence claimed that it was self defence and the act of slashing the neck from the back was an accidental act in response to the attack by victim. The Learned Trial Judge at the end of the defence found that such defence failed to create reasonable doubt and went against the weight of evidence as adduced by the prosecution. In short the prosecution had successfully proved overwhelming evidence be it by way of direct or indirect evidence.
>
> The Appellant in his defence contended that prior to the vicious fight that occurred on the fateful night, he and the deceased had already been engaged in a fight in Kampung Chengal Batu, the deceased's village. He testified that he was stabbed by the deceased in that fight. (Please see page 110 of Appeal Record). However on the fateful night, the Appellant claimed that the deceased drew a curved dagger when he and SP-8 were descending through the stairs. In response to that he jumped to the verandah and took a cleaver used to cut fire woods to engage with the deceased. According to the Appellant, SP-8 also participated in the fight between him and the deceased. The Appellant in his evidence did admit that he had slashed and that he fell down to "jemuran" when SP-8 kicked him. He immediately absconded and went to his auntie's house. He told her aunties what had happened. He also took the cleaver and placed it at his

auntie's house. However upon advise by his sister and his auntie, the Appellant surrendered to the police station. The Appellant also testified in the following as appeared at page 113 of Appeal Record and it is most crucial:

Q : Kenapa anda pergi ke luar bilik dan panggil dia pada malam itu?

A : Kerana saya bergaduh dengan dia dan saya ingatkan dia mencari saya oleh itu saya nak tanya dia.

Saya tidak ada niat langsung untuk keluar dan pergi tetak dia.

Saya tidak ada niat untuk membunuh Si Mati.

Q : Bagaimana bentuk kerambit tersebut?

A : Mata kerambit itu melengkung.

Brief Facts

[6] What is important to note in this case is that there is evidence to show that the victim was armed with a curved dagger (Kerambit or also known as Lawi Ayam) when he went to the house where the incident occurred. The victim's brother (PW8) was also with him. PW8 was the main witness and he was also an interested eyewitness. His evidence places the fault on the appellant despite the fact that there was evidence of PW10 that she saw PW8, the appellant and the deceased involved in a fight. The curved dagger is a weapon which is capable of piercing and ripping off the vital organ of the body. In short it is a sufficiently dangerous weapon. PW8 in his evidence confirms the same:

Q : Selain parang, ada senjata lain semasa OKT dan abang anda bergelut.

A : Ya.

Q : Senjata apa?

A : Kerambit.

[7] The relevant part of PW10 evidence reads as follows:

Q : Pada malam itu ada apa-apa pergaduhan berlaku di rumah itu?

A : Ya, ada.

A - Masa saya naik selangkah untuk kali ketiga untuk ambil kain di bilik untuk keringkan kain yang telah dibilas saya dengar macam orang kena tampar dan lepas itu saya nampak 3 orang sedang bergelut dan saya ambil anak saya dan terus lari ke rumah hadapan untuk minta tolong.

B - Pergaduhan berlaku di ruang tamu.

[8] The learned trial judge had set out the defendant's defence but strikingly failed to comply with what we call as *Radhi*'s (*Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ C (Rep) 311) directions. (see *Sochima Okoye v. PP* [1995] 3 CLJ 371; [1995] 1 MLJ 538). In addition the learned judge has failed to address his mind to the fact that SP8 is an interested witness and that the appellant has also suffered injuries and the deceased did carry a weapon to the place of incident. Very importantly the D learned judge failed to consider the issue of self defence which will entitle the appellant to an acquittal. In addition we must say when a person is charged for murder the court must consider whether the exception to murder under s. 300 applies. In the instant case the learned trial judge did not consider the exceptions which reads E as follows:

> Exception 1 - Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake F or accident.
>
> Exception 2 - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising G such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.
>
> Exception 3 - Culpable homicide is not murder if the offender, H being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill-will towards the person whose death is caused.

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Exception 4 - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Exception 5 - Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death with his own consent.

[9] If the exception applies then culpable homicide may not amount to murder. It may attract lesser penal sanction. We have dealt with this area of jurisprudence in *PP v. Thenegaran Murugan & Another Appeal* [2013] 4 CLJ 364; [2013] MLJU 242 where Hamid Sultan bin Abu Backer JCA made the following observations:

Basically section 299 deals with unlawful killing. For the killing to warrant the death penalty one of the criteria set out in section 300 must be satisfied for the accused to be punished under section 302 of the Penal Code which reads as follows:

Whoever commits murder shall be punished with death.

However, if the prosecution cannot satisfy one of the provisos to section 300 but it is an unlawful killing as set out in section 299 and the defence has placed a credible defence of aggravating and/or mitigating factors as opposed to denial or alibi, than the punishment will have to be lesser than that of death Penalty and in almost all cases of serious nature the punishment will have to be under section 304 of the Penal Code or for lesser conduct or factor it may attract milder sentencing provision under the Penal Code.

Only in cases where the defence succeeds in the defence of self defence as set out in section 96 of the Penal Code, the accused will be acquitted or in the case of insanity the accused will be detained at the Pleasure of the Yang Di Pertuan Agong as set out in section 348 of the Criminal Procedure Code, or lesser sentence when the defence succeeds on mitigating factors (eg, grave sudden provocation) to reduce the charge to attract lesser sentence.

When the defence is mere denial then there cannot be a finding of fact to reduce the charge to section 304 of the Penal Code. In cases where the defence is one of denial the issue will be only whether prosecution has established the required elements to sustain conviction and/or sentence under section 302 of the Penal Code, failing which the accused has to be acquitted, applying the maximum evaluation and beyond reasonable test as propounded by case laws. (See *Public Prosecutor v. Mohd Aszzid Abdullah* [2008] 1 MLJ 281).

Interested Witness

[10] In the instant case SP8 the brother of the accused was an interested witness and he did participate in the fight. His evidence ought to be treated with caution and was not done so in the instant case. We have dealt with this area of jurisprudence in great detail in *PP v. Thenegaran Murugan* [2013] 4 CLJ 364; [2013] MLJU 242, we do not wish to repeat the same. In *Magendran Mohan v. PP* [2011] 1 CLJ 805 the Federal Court had this to say:

> It is clear to us that from her testimony she was an interested witness with a grudge against the appellant and had a purpose of her own to serve. In our judgment her evidence must be treated with caution and requires corroboration.

[11] In our considered view that the failure by the trial judge to follow the directions set out in *Magendran*'s case in respect of caution and corroboration makes the decision perverse and not according to law. This will also attract art. 5(1) of the Federal Constitution to order an acquittal as the evidence to convict was based solely on PW8's evidence which is not safe and according to law. The court has no jurisdiction to deprive the life and liberty of the subject unless the decision is made according to law. Article 5(1) stated as follows:

> No person shall be deprived of his life or personal liberty save in accordance with law.

Right Of Private Defence

[12] Sections 96 to 106 of the Penal Code codifies the law relating to right of private defence of person and property including the extent of and limitation to exercise such right. (see *Rajinder v. State* [1955] 5 SCC 187). Section 96 of the Penal Code states:

> Nothing is an offence which is done in the exercise of the right of private defence.

[13] As long as the force to defend is not disproportionate to the attack by the aggressor the defence under s. 96 will succeed and a conviction cannot stand. Whether such force to defend was disproportionate is one of finding of fact and the learned trial judge has failed to adumbrate this in the judgment. We are of the

considered view that the fact that the deceased carried a dangerous weapon to the scene of the crime where subsequently a fight ensued, and that PW8 was also involved in the fight, attracted s. 96 of the Penal Code. Failure to consider the defence in the right perspective will render the decision perverse and in breach of s. 96, which will attract the constitutional protection under art. 5(1), calling for the appellate court to intervene and set aside the conviction. Furthermore, in this case there was the evidence of PW7, Dr Adam who testified as to the injuries suffered by the appellant and as can be seen also in exh. P48.

[14] In the instant case after having pursued the appeal record *in extenso* we do not see anything inherently incredible about the defence story.

[15] The hallmark in judgment writing in criminal case necessarily require the court to consider fairly and justly the defence story without attaching too much on legal niceties and strictly follow the *Radhi*'s direction which we had adumbrated in great detail in the case of *Ahmad Mukamal Abdul Wahab*, *Suhana Kamarudin and Shawal Hashil v. PP*, Cri A No. C-05-44-2011. And be very conscious of the constitutional protection given to the accused in art. 5(1) before depriving the accused of his life or liberty.

[16] Failing to adhere to what we have said earlier will in actual fact make the judgment a scrap paper unworthy of any consideration in law as it is a notorious proposition in our criminal jurisprudence that a person is innocent until proven guilty. The appellate court is bound to set aside the conviction if the above issues are not dealt with by the trial judge unless there are sufficient evidence to convict the accused for the offence charged or reduction of the charge as the case may be, disregarding the judgment or part of the judgment.

[17] In the instant case we are of the view that the judgment is flawed in various aspects. And the failure of the trial judge to direct himself according to law amounts to misdirection resulting in miscarriage of justice, and attracts the jurisprudence 'not safe to convict'. (see *PP v. Thenegaran Murugan & Another Appeal* [2013] 4 CLJ 364; [2013] MLJU 242). In *Sochima Okoye v. PP* [1995] 3 CLJ 371; [1995] 1 MLJ 538, Justice Gopal Sri Ram had this to say:

> The learned judge, having found the appellant's story about the existence of James Smith to be true, ought to have addressed his judicial mind to the further question as to whether there was any

reasonable doubt raised that Smith was the real trafficker. Had he done so he may well have held that he was not, in which event our task would have been made that much easier. Unfortunately he did not and it is our view that the failure by the learned judge to administer unto himself the *Radhi* direction renders his ultimate conclusion fatally flawed.

In our judgment, the failure of a judge to properly direct himself or in misdirecting himself is to be treated on the same footing as a non-direction or a misdirection by a judge to a jury. *Rameshwar v. State of Rajasthan* AIR 1952 SC 54; *Tan Yook Suan v. R* [1954] MLJ 116 and *Gooi Loo Seng v. PP* [1993] 2 MLJ 137 are decisions that are authority for this proposition. And in the last mentioned case Edgar Joseph Jr SCJ (now FCJ) stated the principle in the following words:

> Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of Pickford J in *R v. Bundy* 5 Cr App R 270: '... the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence'.
>
> We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

Before us, the learned deputy fairly, and quite properly, conceded that the learned judge was duty bound, in the light of his earlier finding, to administer unto himself the *Radhi* direction. In these circumstances, we had no alternative but to intervene and make the orders we have set out in the opening paragraph of this judgment.

[18] In conclusion for reasons stated above, we take the view that it is not safe to convict. And accordingly the conviction and sentence by the High Court is set aside. The appellant is acquitted and discharged.

[19] We hereby order so.